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FILED
FEB 11 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 646

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

VERSUS

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
OPINIONS BELOW	1
STATUTE INVOLVED. 28 USC 2106	2
RESPONDENTS' STATEMENT OF THE CASE	3
REASONS FOR NOT GRANTING THE WRIT	6
CONCLUSION	10

TABLE OF AUTHORITIES

United States Statutes: 28 USC 2106	2, 6
Texas Insurance Code, Art. 3.65 (formerly Art. 4763, Tex. Stat.)	2

CASES

Berry v. Commissioner of Internal Revenue, 254 F. 2d 471 (C.A. 9-1957)	7
Burstein v. U. S., 232 F. 2d 19 (C.A. 8-1956)	7
Commerce Oil Corp. v. Dixie Carriers, Inc., 252 F. 2d 386 (C.A. 5-1958)	4
Greenspahn v. Joseph E. Seagram & Sons, Inc., 186 F. 2d 616 (C.A. 2-1951)	7
McAllister v. U. S., 348 U.S. 19 (1954)	4
McClure v. Heirs of Sheek, 4 S.W. 552 (1887)	8
Porter v. Holt, 11 S.W. 494 (Tex. 1889)	8
United States v. John J. Felin & Co., 334 U.S. 624 (1948)	5, 7
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)	1, 3, 4

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Opinions Below

The United States Supreme Court rendered a decision in this case on February 28, 1955. The decision is reported in 348 U.S. 310 under the name of *Wilburn Boat Company, et al. v. Fireman's Fund Insurance Company*, and is reprinted in the transcript of record, Court of Appeals Case Number 16,945, Pages 4 to 35 (RR 4-35). The U. S. District Court at Sherman, Texas filed a "Memorandum Decision" which is unreported but is set out in the printed transcript of record, Court of Appeals Case

Number 16,945 (RR. 56 to 60). The Fifth Circuit Court of Appeals decision in Case Number 16,945 is reported in 259 F. 2d 662 and is reprinted in the appendix to the Petition.

Statute Involved, 28 USC 2106

"The Supreme Court or any other court of appellate jurisdiction may * * * reverse any judgment * * * lawfully brought before it for review and may remand the cause * * * or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

Respondents' Statement of the Case

Petitioner's "Summary Statement" cannot be accepted.

On June 27, 1949, citiation was served on petitioner's Texas statutory agent, located in the Wilson Building, Dallas, Texas (R. 10, 11).[1] The petitioner has never contested the Texas service of process. It could not do so. An insurance company doing business in Texas is required by law to designate a statutory agent for service of process (Texas Insurance Code, Article 3.65, formerly Article 4763, Revised Civil Statutes of Texas).[2]

On July 15, 1949, Fireman's Fund Insurance Company filed a Petition to Remove this Civil Action to the

[1] "R" refers to printed transcript in first appeal to Fifth Circuit. Case No. 13,956. "RR" refers to printed transcript in second appeal to Fifth Circuit, Case No. 16,945. Numbers after R and RR refer to original printed page numbers in these transcripts.

[2] According to the records of Texas Board of Insurance, Fireman's Fund Insurance Company paid to the State of Texas over $176,000.00 in occupation and maintenance taxes on premiums collected on Texas business during 1948 and 1949.

District Court of the United States for the Eastern District of Texas, Sherman Division. The heading of the petition states that Fireman's Fund Insurance Company is "an insurance company doing business in Dallas County, Texas and is incorporated under the laws of the State of California" (R 2 and 3). The same is true of the Removal Bond and Removal Notice filed by the insurance company (R 5, 7). The Petitioner, in its Affidavit for Service of Notice to the Clerk of the 59th District Court of Grayson County, Texas, admitted that Fireman's Fund Insurance Company did business in Texas (R 14). Also see petitioner's Federal Court stipulation for an extension of time to file motions and answers (R 19). The respondents relied on the truth of these admissions. These admissions standing alone are sufficient to support the Trial Court's finding that the petitioner did business in Texas and was authorized to do business in Texas and that the appropriate state law was the law of Texas (RR 53 and 54).

On February 28, 1955, the Supreme Court reversed and remanded this case and ruled that general admiralty law would not apply and that the District Court should try same "under appropriate state law" (348 U.S. 310) (RR 17). A copy of the certificate permitting the insurance company to do business in Texas was submitted to this Court in Appendix A of petitioner's brief filed on August 23, 1954. Thereafter, the insurance company did not choose to deny the validity of the certificate or to amend its pleadings in order to raise the defensive issue that they were not doing business in Texas. By stipulation, the insurance company voluntarily elected not to contradict their admissions that they "were doing business in Dallas, Texas". On the record and the stipula-

tion, petitioner in effect agreed to accept the law of the forum, to-wit: Texas.

Astounding as it may appear, the insurance company voluntarily chose not to submit any testimony of their own witnesses to support its defenses. At the conclusion of the assured's prima facie case of contractual liability at the original trial in December 1949 (R 224), the insurance company elected to stand on their motion for judgment. This motion was granted by the first trial court. Petitioner voluntarily pitched their case on the legal proposition that admiralty law governed the rights of the parties to the exclusion of State insurance regulations. They lost their point. (348 U.S. 310).

The bold faced heavy type of Footnote 1 on Page 2 of the insurance company's petition, claims to describe what they now allege to be a "foul loss". The footnote states fact and legal issues which have already been decided against the insurance company (RR 36-60). The findings of fact of the Trial Court have not been declared "clearly erroneous" and therefore, petitioner's Footnote No. 1 cannot be substituted for the Trial Court's findings. (RR 36-60). See *McAllister v. U. S.*, 348 U.S. 19, 20, 1954 AMC 1999, and *Commerce Oil Corp. v. Dixie Carriers, Inc.*, 252 F. 2d 386, 1958 AMC 815, 818, 819 (CA-5, 1958). Petitioner's version of the facts are misleading and prejudicial and do not tell the full story of this acknowledged fire loss which the insurance company has kept in litigation for ten years.

The Appellate Court's decision of September 18, 1958, to remand this case placed the insurance company in the dilemma of being forced to prove defenses which they

know, or should know, cannot be proved.[3] Petitioner now seeks to extricate itself from its sad plight by pseudo legal conclusions based upon some nebulous legal right arising out of a stipulation they voluntarily executed.

On May 29, 1957, the Trial Court filed its "Memorandum Decision" and ruled that petitioner was doing business in Texas (RR 53 and 54). This legal conclusion has not been, and cannot be, denied or stipulated against (*United States v. John J. Felin & Co.*, 334 U.S. 624, 640.) The Trial Court's ruling was made after both parties submitted trial briefs to the District Court and after extensive oral argument and presentation of the facts of the former trial. On April 22, 1957, the Certificate of the Texas Board of Insurance Commissioners (RR 64) was submitted to the Trial Court, on plaintiff's oral motion, to rebut petitioner's oral argument that the insurance company was immune from the insurance laws of Texas. The Trial Court granted the motion and directed respondent to furnish an authenticated certificate for the record. After carefully considering all available evidence and petitioner's argument on the very point now presented to the Supreme Court, the District Court Judge, exercising his sound judgment, and mindful of the law pertaining to public documents, took judicial notice of the Texas certificate (RR 64) which is a part of the public records of Texas. After reviewing the pleadings and documents on file and the facts presented, the Court concluded that the insurance laws of Texas governed the rights of the parties (RR 53-54).

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[3] During 1948 and 1949, Fireman's Fund Insurance Company collected over $5,000,000.00 premiums on insurance business written in Texas. (Taken from public records of Texas State Board of Insurance.)

On June 26, 1957, judgment was entered awarding Wilburn Boat Company damages in the liquidated sum of $40,000.00 with interest at the rate of 6 percent per annum from May 12, 1949 (RR. 60-61).

On September 18, 1958, the Court of Appeals for the Fifth Circuit reversed the decision of the lower court. In so doing, the Appellate Court placed in issue and considered a defense not pleaded by the insurance company. In spite of petitioner's admissions and the above judicial admission, the Appellate Court ruled that there was insufficient proof for the Appellate Court to resolve the issue of whether or not Fireman's Fund Insurance Company was doing business in Texas. The case was remanded to the District Court for additional proof and was reversed to give petitioner an opportunity to amend its pleadings and present additional evidence in support of its defenses and give respondent an opportunity to cross examine petitioner's witnesses and if necessary, present rebuttal testimony.

Reasons For Not Granting the Writ

The questions presented in the petition herein filed challenge the right of the United States Court of Appeals to remand a civil action to a District Court for additional proof, where counsel representing both parties to the lawsuit stipulate that the previous trial record of the same case and judicial admissions of fact can be used to determine the rights of the parties.

The Judicial Code, (28 USC 2106) quoted above, authorizes the Court of Appeals to remand the case at bar, if additional evidence is necessary to assist the appellate court to determine a vital point in a lawsuit. In the in-

terest of justice this must be done, irrespective of a stipulation voluntarily entered into by the parties to the lawsuit. The stipulation was not intended to be a drop cloth to hide true facts but was rather intended to expedite the handling of this case and to conserve the time and expenses of all parties concerned including the judiciary.

The decision of the Fifth Circuit is not in conflict with any of the decisions relied upon by the petitioner. The case of *Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F. 2d 616 (CA2, 1951), involves a "settlement stipulation" and not a stipulation relating to a previous trial record. Different rules and reasoning apply where the parties to a lawsuit stipulate to settle a claim and thereafter one of the parties welshes on the settlement agreement. *Berry v. Commissioner of Internal Revenue*, 254 F. 2d 471, 474, 475 (CA9, 1957), has no application to the stipulation now under consideration because it involves a federal tax case which is governed by special statutory rules concerning income tax stipulations. See 26 U.S.C. 1111, Tax Court Rule 31(b). This case actually supports the Fifth Circuit decision in the case at bar. The *Berry case* was remanded in spite of the stipulation. *Burstein v. U.S.*, 232 F. 2d 19 (CA8, 1956), is not in conflict with the case at bar. In that case, the district court made an error in applying stipulated facts to contract damages fact issues and the appellate court remanded the case.

In *United States v. John J. Felin & Co.*, 334 U.S. 624, 640 (1948), this Court ruled:

> "Even where the parties to the litigation have stipulated to the facts, this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law."

The Supreme Court of Texas in *McClure v. Heirs of Sheek*, 4 S.W. 552 (1887), has this to say concerning the effect of a stipulation entered into by respective counsel.

> "Agreements of counsel in regard to the trial of a cause are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the Court, in the exercise of a sound discretion, when their enforcement would result in serious injury to one of the parties, and the other would be prejudiced by its being set aside."

To the same effect *Porter v. Holt*, 11 S.W. 494 (1889).

Petitioner cannot be prejudiced because they have admitted that they were doing business in Texas. They have not and cannot deny this fact or legal conclusion. See Footnotes 2 and 3. The argumentative conclusions and opinions of counsel, unsupported by affidavits or proof, cannot by themselves establish the fact that the insurance company will be seriously injured if this case is remanded to the trial court.

The insurance company argues that if this lawsuit is remanded and retried, the evidence will no longer be "fresh and available". The answer is that the public records of Texas are, and will be, just as "fresh and available" at a new trial as they were ten years ago. If petitioner's investigation of this claim has not produced an "arsonist" in ten years time, it is unlikely one will be discovered at this late date or before retrial. Up to this time arson has not been pleaded as a defense. The truth of the matter is, the petitioner does not have available facts to support its defenses, whether pleaded or not. By their own choice, petitioner elected for the past ten years to contest this insurance claim on law points. It

is too late for petitioner to complain about "stale evidence" which they elected not to produce or bring to light.

It is almost inconceivable that one of the largest insurance companies in the United States should attempt to conceal its true business status in the various states of the Union in order to defeat an acknowledged fire insurance claim of one of its assureds. State insurance regulations do not permit this. One questions whether a State can continue to recognize a foreign insurance company when said company seeks to defeat insurance claims of its citizens on the grounds that there is insufficient evidence in the record to establish the truth of a fact they admit and cannot deny, to-wit: that the insurance company was and is doing business in the State. This is especially true where the public records of State and the pleadings on file (R. 2, 3, 5, 7, 14, 19), clearly indicate that the insurance company was doing business in the State. How far can an insurance company push its privilege to do business in a State before there is a breach of trust with the citizens of that State?

In 1948 and 1949, Fireman's Fund Insurance Company did, and still does, business in every state of the Union. The total admitted assets of the company was $335,000,000.00. In 1949, the net premium earned was $107,000,000.00 and the losses incurred were $54,000,000.00. See *Moody's Bank & Finance Manual of 1957*, Pages 1436, 1437.

If an injustice has been done by the ruling of the Fifth Circuit Court, it fell upon the assureds. Respondents operated a small town grocery store and they lost all their liquid assets and their grocery business because petitioner refused to pay an acknowledged fire loss.

CONCLUSION

No substantial federal question has been raised by petitioner, there is no direct conflict of appellate court decisions, the insurance company has suffered no injustice, therefore, this petition for writ of certiorari should be denied.

Respectfully submitted,

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